

RESOLUTION AUTHORIZING UPSET BID PROCESS  
FOR SALE OF THE NORTH GARAGE

WHEREAS, the City of Durham (“City”) owns certain property comprising a structured parking facility commonly referred to as the “North Garage” and described as Lot 1, containing 2.054 acres, as shown on that certain plat titled “Final Plat City of Durham American Tobacco Campus North Parking Garage” prepared by Donald F. Greeley, Professional Land Surveyor, dated July 28, 2003 and recorded in Plat Book 159, Page 235 of the Durham County Public Registry, together with all fixtures, equipment, personal property and improvements owned by the City and located thereon as of the date of Closing (collectively, the “Property”); and

WHEREAS, North Carolina General Statute § 160A-269 permits the City to sell property by upset bid, after receipt of an offer for the property, and, City Charter Section 86.1 permits the City to sell real property subject to covenants, conditions and restrictions; and

WHEREAS, the City has received an offer (the “Initial Bid”) to purchase the Property, in the amount of \$8,000,000.00 subject to certain conditions, submitted by ATC North Garage, LLC; and

WHEREAS, ATC North Garage, LLC (the “Initial Offeror”) has agreed to pay the required five percent (5%) deposit on its offer upon approval and adoption of this Resolution and execution of the Offer to Purchase Form (“Offer to Purchase Form”);

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF DURHAM RESOLVES THAT:

1. The City Council authorizes the sale of the Property through the upset bid procedure of N. C. G. S. § 160A-269.
2. The City Clerk shall designate that the Real Estate Division for the Department of General Services shall administer the upset bid procedure. The Real Estate Division shall maintain a copy of the proposed Offer to Purchase Form (“Offer to Purchase Form”) for public inspection. The Offer to Purchase Form as proposed by the Initial Offeror includes certain special conditions, which shall be made a part of the sale of the Property. The special conditions are set forth in detail in the Offer to Purchase Form and provided in Exhibit A, attached hereto.
3. The Real Estate Division shall cause a notice of the Initial Bid to be published. The notice shall describe the Property and the amount of the offer and conditions and state the terms under which the offer may be upset.
4. Persons wishing to upset the Initial Bid shall submit a sealed bid with their offer, with the information required by the notice, to the Real Estate Division, within 10 days after the notice of the Initial Bid is published. At the end of the 10-day period, bids received will be opened, and the highest bid will become the new offer. If there is more than one bid in the same highest amount, the first such bid received will become the new

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offer. If more than one bid in the amount of the highest offer is received at the same time, lots shall be drawn to determine the new offer.

5. If a qualifying higher bid is received, the Real Estate Division shall cause a new notice of upset bid to be published, and shall continue to do so until a 10-day period has passed during which the Real Estate Division does not receive a qualifying upset bid. At that time, the amount of the final high bid shall be reported to the City Council.

6. A qualifying higher bid is one that raises the existing offer by at least 10% of the first \$1,000 of that offer and 5% of the remainder of that offer. A qualifying higher bid may not be made from persons owning delinquent City-County taxes or assessments.

7. A qualifying higher bid must also be accompanied by a deposit in the amount of five percent (5%) of the bid; the deposit may be made in cash, bank check or wire transfer. The City will return the deposit on any bid not accepted, and will return the deposit on an offer subject to upset if a qualifying higher bid is received. The City will return the deposit of the final high bidder at closing consistent with the terms of the Offer to Purchase Form.

8. The terms of the final sale are that the City Council must approve the final high offer before the sale is closed, which it will do within thirty (30) days following receipt of the final high bid after the final upset bid period has passed.

9. The City reserved the right to withdraw the Property from sale at any time before the final high bid is accepted and the right to reject at any time all bids.

10. If no qualifying upset bid is received after the initial public notice, the offer set forth above is hereby accepted, and the City Manager is authorized to execute the Offer to Purchase Form with the Initial Offerer and the appropriate city officials are authorized to execute all other instruments necessary to convey the Property to ATC North Garage, LLC.

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**EXHIBIT A – SPECIAL CONDITIONS TO SALE OF NORTH GARAGE**

1. The Property is subject to two leases and one property management agreement described below. At Closing the City shall assign in writing to Buyer, and Buyer shall execute an instrument by which it assumes all of the City's obligations under such leases and property management agreement. The leases and property management agreement are more particularly described as follows:
  - a. Parking Space Agreement for the North Garage between the City of Durham, as landlord, and Research Triangle Regional Public Transportation Authority (d/b/a GoTriangle) ("GoTriangle"), as tenant, dated September 26, 2003 (the "GoTriangle Lease");
  - b. Parking Lease Agreement for Parking in the North Parking Garage between the City of Durham, as landlord, and American Campus, LLC, as tenant (the "Master Tenant"), and any entity that controls, is controlled by, or is under common control with, Master Tenant, a "Master Tenant Affiliate"), dated March 15, 2012 (the "Master Lease"); and
  - c. Parking Management Services Agreement between the City of Durham, as owner, and American Campus, LLC, as manager, dated March 15, 2012 (the "Management Agreement").

For the purposes of Section 1.b., "control" shall mean the power, directly or indirectly, either to direct or cause the direction of the management and policies of an entity, whether through the ability to exercise voting power, by contract or otherwise.

2. Article V of the GoTriangle Lease grants GoTriangle the right of first refusal to acquire the Property pursuant to the terms and conditions contained therein. Such right of first refusal impairs the value of the Property and also impairs Buyer's ability to finance the acquisition of the Property. The City has agreed to cause such right of first refusal to be extinguished prior to Closing. Accordingly, prior to Closing, the City and the GoTriangle shall amend the GoTriangle Lease in order to delete in its entirety the right of first refusal contained in Article V thereof. Such amendment shall be subject to the written approval of Buyer, such approval not to be unreasonably withheld. Further, as contemplated in Section 7.5(a) of the GoTriangle Lease, at Closing the City shall deliver to Buyer an estoppel certificate executed by GoTriangle and confirming there are no defaults under the GoTriangle Lease. If the City shall fail to cause the GoTriangle Lease amendment and the estoppel certificate to be executed by the City and GoTriangle prior to Closing, then Buyer shall have the right to terminate this Offer to Purchase Form and receive a refund of the Deposit by notifying the City thereof in writing. The right to terminate in this Section 2 shall expire if such termination notice is not received by the City at or prior to the date of Closing.
3. Intentionally omitted.
4. Subject to circumstances of Force Majeure described below, within 24 months following Closing, Buyer shall, without disrupting the rights of the tenants under the GoTriangle Lease or the Master Lease, vertically expand the North Garage by at least an additional 300 parking spaces that are in compliance with the applicable building code as evidenced

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- by the issuance of an applicable certificate of compliance (the “Additional Spaces”), failing which Buyer shall pay to the City upon demand, as the City’s sole and exclusive remedy and as liquidated damages and not a penalty (the parties agreeing that actual damages are hard to quantify, and that these liquidated damages are a good faith effort of the parties to quantify such actual damages), an amount equal to One Million and No/100 Dollars (\$1,000,000.00). For the purposes hereof, “Force Majeure” shall mean any event, the occurrence of which prevents or delays the performance by Buyer of its obligations hereunder despite the Buyer’s commercially reasonable efforts to perform. Force Majeure events that can prevent or delay the Buyer’s performance include, without limitation, acts of war or terrorism; riots; civil unrest; strike, fire or other casualty; inclement weather; governmental action or inaction; inability to procure permits, consents or approvals required by law, rule, regulation or code; inability to procure services or materials despite commercially reasonable efforts; acts of God; or any other cause(s) beyond the commercially reasonable control of Buyer. If Buyer is prevented from or delayed in constructing the Additional Spaces due to an event(s) of Force Majeure, the City shall have no right or remedy therefor (for clarity, if Buyer is so prevented the City shall not be entitled to the foregoing liquidated damages in the amount of \$1,000,000.00).
5. If the Buyer is neither the Master Tenant nor a Master Tenant Affiliate (the latter two terms are defined in Section 1.b above), then, if requested by the Master Tenant, at Closing Buyer shall amend the Master Lease in order to lease the Additional Spaces to the Master Tenant pursuant to the same terms and conditions as the Master Lease. For clarity, Master Tenant shall pay rent for each of the Additional Spaces in the same amount as the Master Tenant is required to pay per space under the Master Lease.
  6. At Closing, the City shall grant a construction easement to Buyer over and across a limited portion of the parcel of land owned by the City and located adjacent to the Property, having an address of 515 W. Pettigrew Street and a PIN # 0821-08-77-6487. The form of such easement is attached hereto as Exhibit A.
  7. If a third party submits a qualified upset bid for the Property, and such upset bid is accepted by the City, then at the closing ATC North Garage, LLC agrees to cause its affiliate, American Campus III, LLC (“ACIII”), to provide a temporary easement to use a limited portion of the Adjoining Property (defined below) as reasonably necessary to operate a crane in connection with the expansion of the North Garage. Such easement shall be limited in duration to the time period for the initial construction of the Additional Spaces, and shall be on terms that are reasonably acceptable to ACIII. For the purposes hereof, the “Adjoining Property” shall mean that certain tract or parcel of land owned by ACIII and located adjacent to the Property, with tax parcel identification number 0821-12-87-2024.
  8. At Closing, Buyer and the City agree to enter into, if Buyer is the Master Tenant or a Master Tenant Affiliate, a parking agreement to be recorded in the public registry or, if Buyer is not the Master Tenant nor a Master Tenant Affiliate, a lease amendment to the Master Lease pursuant to which:
    - a. Buyer shall agree that 75 parking spaces on the first floor of the North Garage shall be reserved for use, at all times the North Garage is in operation, by the general public on a first-come, first-served basis for hourly parking; Buyer shall be permitted to charge for such parking at any rate Buyer deems appropriate,

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provided, however, such rate shall be consistent with, and not exceed, the highest hourly parking rate of similarly situated parking spaces of the other parking decks serving the American Tobacco Campus in Durham, NC (such other parking decks being commonly referred to as the “South Garage” and the “East Garage”, and collectively with the North Garage, being referred to herein as the “American Tobacco Parking Garages”); and

- b. Buyer shall agree to make available a minimum of 600 parking spaces (the “Special Events Parking”) in the North Garage for Special Events (defined below) that occur during Special Events Hours (as defined below) at the Durham Performing Arts Center (the “DPAC”) or the Durham Bulls Athletic Park (the “DBAP”) until June 30, 2045, subject to the following terms and conditions:
- i. Buyer shall guarantee the availability of the Special Events Parking (provided Buyer does not guarantee the availability of parking spaces above the minimum specified above) in the North Garage for Special Events that occur during Special Events Hours (“Special Events Hours” is defined as between 6:30 p.m. through 7:00 a.m., Monday through Thursday, and from 6:30 p.m. Friday through 7:00 a.m. Monday). A “Special Event” is defined as an event at the DPAC or DBAP that is reasonably expected to sell at least 1,000 tickets or for a DPAC Broadway Series performance for which season tickets are sold (collectively, “Special Events”); Buyer does not guarantee that parking in excess of the Special Events Parking will be available within the North Garage during any Special Event; however, if such extra parking is available, Buyer agrees to allow additional attendees of such Special Event to park within the North Garage at the Market Rate (as defined below);
  - ii. Buyer shall provide staff at the North Garage for each Special Event; the City shall notify Buyer of each Special Event at least 60 days in advance of the event;
  - iii. If parking is available outside the Special Events Hours, Buyer shall allow Special Event attendees to access the Special Events Parking in the North Garage not less than 2 hours before the commencement of the applicable Special Event and not less than 2 hours after the end of such Special Event; Buyer does not guarantee the availability of Special Events Parking outside of Special Events Hours;
  - iv. Buyer shall charge a per car parking fee for Special Events not to exceed the highest per car parking fee charged in other American Tobacco Parking Garages (the “Market Rate”), provided, however, DPAC Broadway Series season ticket holders shall pay a reduced Market Rate for each vehicle during the following periods of time as follows:

<u>Calendar Year</u>	<u>Reduction in Market Rate</u>
2016	75% (i.e., members shall pay 25% of Market Rate)

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2017	50% (i.e., members shall pay 50% of Market Rate)
2018	25% (i.e., members shall pay 75% of Market Rate)
2019 and all subsequent calendar years	0% (i.e., members shall pay 100% of Market Rate)

- v. If requested by the City, Buyer shall accept payment for the parking fee for Special Events through a voucher program coordinated with the DPAC, whereby the DPAC operator would pay Buyer the established car parking fee for each voucher collected by Buyer from DPAC Broadway Series season ticket holders that park in the North Garage. At the request of the DPAC operator, which shall be sent to the Buyer at least 5 days in advance, Buyer shall reserve up to 600 parking spaces for priority access by DPAC Broadway Series voucher holders when a Special Event during Special Events Hours is occasioned by both (i) a DPAC Broadway Series event and (ii) a DBAP event expected to have more than 1,000 attendees (“DPAC Priority Reservation”). If the DPAC operator requests a DPAC Priority Reservation, the DPAC operator will pay an amount equal to the greater of the number of DPAC vouchers actually used or 90% of the number of spaces it requested be reserved for the DPAC Priority Reservation. For the purpose of clarity, when there is a DPAC Priority Reservation, the number of Special Events Parking spaces in the North Garage that Buyer is required to provide to the City shall be governed by this Section 8 b. v. (i.e., shall be governed by how many spaces the DPAC operator requests, which shall not exceed 600 spaces) and not by any other provisions of this Offer to Purchase Form.
- vi. Notwithstanding anything to the contrary contained herein, for a period commencing on the Closing date and continuing until the earlier to occur of (the “Construction Period”) (1) the date Buyer completes construction of at least three hundred (300) parking spaces in the North Garage, and (2) the date that is twenty-four (24) months following the Closing date (which 24-month time period shall be extended by any delays caused by Force Majeure), Buyer shall have no obligation to provide the seventy-five (75) visitor parking spaces described above. Further, notwithstanding anything to the contrary contained herein, during the Construction Period, Buyer does not guarantee that the Special Events Parking (i.e., a minimum of 600 parking spaces) will be available in the North Garage. Instead, during the Construction Period, parking in the North Garage by the City and its invitees for Special Events during Special Events Hours shall be to the extent available.
- c. For any event at the DPAC or DBAP that is not a Special Event (each a “Normal Event” and collectively the “Normal Events”), Buyer shall, to the extent available, during the Special Events Hours, and so long as the North Garage is in operation, allow Normal Event attendees to park in the North Garage at a rate not

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to exceed the Market Rate. Buyer does not guarantee that parking will be available in the North Garage for Normal Events. Buyer shall not be required to provide staff at the North Garage for Normal Events.